Cornell Law Review

Volume 72
Issue 1 *November 1986*

Article 7

Statute of Limitations for Citizens Suits Under the Clean Water Act

Carie Goodman McKinney

STATUTE OF LIMITATIONS FOR CITIZEN SUITS UNDER THE CLEAN WATER ACT

The pollution control statutes of the 1970s contain an effective enforcement provision—the citizen suit.[1] These statutes marked the first time that federal law expressly empowered citizens to vindicate the rights of the general public, rather than to protect their own economic interests.[2] Recently, citizen enforcement of the Clean Water Act[3] (the Act) has exploded.[4] In 1983 and early 1984 citizens filed 195 suits and notices of intent to sue,[5] almost five times the number filed during the previous five years.[6] Citizen suits are now initiated almost as frequently as federal enforcement actions. Between January 1983 and April 1984, private entities filed approximately ten enforcement actions for every thirteen filed by the Environmental Protection Agency (the EPA).[7] Industries regulated by the Act have responded to citizen enforcement actions with a variety of defenses.[8] These include lack of standing,[9] inadequacy of

---

1 Citizen suit provisions allow a person whose environment was affected by someone violating a federal environmental law to sue the violator in federal court to compel compliance with the law and in some instances to collect penalties on behalf of the United States Treasury. These provisions also allow private parties to challenge nondiscretionary actions of the administrating agency. For a discussion of the citizen suit provision in the Clean Water Act, see *infra* notes 29-39 and accompanying text.

2 Environmental statutes are unique, not because they permit private enforcement, but because they do not provide for private damages. *See* Miller, *Private Enforcement of Federal Pollution Control Laws* (pt. 1), 13 Envtl. L. Rep. (Envtl. L. Inst.) 10,309 (1983).

3 Federal Water Pollution Control (Clean Water) Act Amendments of 1972, Pub. L. No. 92-500, §§ 101-518, 86 Stat. 816, 816-96; 33 U.S.C. §§ 1251-1376 (1982 & Supp. III 1985).

4 *See* Fadil, *Citizen Suits Against Polluters: Picking Up the Pace,* 9 HARV. ENVTL. L. REV. 23, 34-35 (1985); Miller, *Private Enforcement of Federal Pollution Control Laws* (pt. 2), 14 Envtl. L. Rep. (Envtl. L. Inst.) 10,063 (1984); Schwartz & Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act,* 17 NAT. RESOURCES LAW. 327 (1984); Moore, *Private Suits Flood Companies Under Clean Water Provision,* Legal Times, May 7, 1984, at 1, col. 2.

5 ENVIRONMENTAL LAW INSTITUTE, CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES III-10 (fig. D) (1984).

6 Citizens initiated 41 actions between 1978 and 1983. *Id.*

7 In 1983 and the first four months of 1984, 88 civilian lawsuits (not mere notices) were filed, *id.*, as compared with 118 filed by the Department of Justice for the EPA. *Id.* at III-29 (table 5).

8 *See generally* Fadil, *supra* note 4, at 38-52; Schwartz & Hackett, *supra* note 4, at 338-52.

9 *See, e.g.,* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (no implied private right of action under Act; plaintiff must demonstrate real injury or threat of real injury); Sierra Club v. SCM Corp., 747 F.2d 99 (2d Cir. 1984) (§ 505 of Act does not eliminate injury in fact requirement for standing). The *Sea Clammers* Court cited the general test for standing set forth in Sierra Club v. Morton, 405 U.S.

notice,[10] mootness or lack of authority to sue for past violations,[11] preemption by administrative enforcement,[12] and failure to meet statutes of limitations.[13]

The Act does not provide a statute of limitations for either citizen or government enforcement actions.[14] When a federal statute is silent, courts must decide what, if any, limitation period should apply. Whether a citizen or government suit, courts' decisions involve much the same considerations. Several federal district courts[15] have held that the normal practice of borrowing state statutes of limitations should not be applied to cases under the Act because doing so would frustrate the congressional goal of nationally uniform enforcement. These same courts, however, disagree on two issues: (1) whether the same rule should apply to both citizen and government suits, and (2) whether the courts should borrow a limitation period or periods from elsewhere in federal law or leave the time for enforcement actions unlimited.

Resolution of these two issues first requires investigation of the history, policy, and goals of the Act, and the general purposes served by statutes of limitations. The next step in the analysis is to determine what alternatives are available to federal courts when they are confronted with a statute that fails to specify a limitation period. This Note examines these aspects of the Clean Water Act's citizen suit provision and concludes that the same limitation period should govern both citizen and EPA enforcement actions, and that

---

727 (1972). 453 U.S. at 16-17. In *Sierra Club,* the Court had stated that "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the [plaintiff] be himself among the injured." 405 U.S. at 734-35. For further discussion of standing under the Clean Water Act, see Fadil, *supra* note 4, at 38-41; Miller, *supra* note 2, at 10,314-17.

10 *See* Miller, *supra* note 4, at 10,063-67 (discussion of notice requirement with case citations); Note, *Notice by Citizen Plaintiffs in Environmental Litigation,* 79 MICH. L. REV. 299 (1980).

11 *See, e.g.,* Hamker v. Diamond Shamrock Chem. Co., 756 F.2d 392 (5th Cir. 1985) (continuing violation required); Student Pub. Interest Research Group of N.J., Inc. v. Monsanto Co., 600 F. Supp. 1474, 1476-77 (D.N.J. 1985) (continuing violation not required); Fadil, *supra* note 4, at 44 (discussion of jurisdiction when violation is noncontinuing).

12 *See* Polebaum & Slater, *Preclusion of Citizen Environmental Enforcement Litigation by Agency Action,* 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,013 (1986) and cases cited therein.

13 *See* cases cited *infra* note 84; *see also* Fadil, *supra* note 4, at 50-51.

A statute of limitations is "[a] statute prescribing limitations to the right of action on certain described causes of action . . . .; that is, declaring that no suit shall be maintained on such causes of action . . . unless brought within a specified period of time after the right accrued." BLACK'S LAW DICTIONARY 1077 (5th ed. 1979).

14 *See generally* Clean Water Act §§ 101-518, 33 U.S.C. §§ 1251-1376 (1982 & Supp. III 1985). No environmental statute provides a limitation period for citizen suits. *See* Miller, *supra* note 2, at 10,311 n.12 (listing statutes).

15 *See* cases cited *infra* note 84.

courts should adopt the generic federal five year limitation period for penalties.

I
BACKGROUND

A. The Clean Water Act

1. *General Structure*

When Congress enacted the Clean Water Act, it expressly intended to institute nationally uniform pollution control standards and enforcement.[16] To achieve this goal, Congress empowered the EPA to set national "effluent standards" fixing the maximum lawful discharge of certain pollutants.[17] Any discharge exceeding the promulgated effluent limitations violates the Act and subjects the discharger to enforcement proceedings.[18] Although the states bear initial enforcement responsibility, ultimate enforcement authority resides with the EPA Administrator.[19] By combining national standards with ultimate federal enforcement, Congress sought to eliminate the tendency of states to compete for industrial investment and jobs by offering lenient pollution control policies.[20] Congress in-

16 *See* Letter from William Ruckelshaus, EPA Administrator, to the Office of Management and Budget (Oct. 11, 1972) (recommending presidential approval of Act in order to promote uniform enforcement), *reprinted in* CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, 93D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 156-57 (1973) [hereinafter CLEAN WATER HISTORY]; 118 CONG. REC. 33,693 (1972) (statement of Sen. Muskie) (uniformity and enforceability are two chief concerns of Act), *reprinted in* CLEAN WATER HISTORY, *supra,* at 162-63; American Frozen Food Inst. v. Train, 539 F.2d 107, 129 (D.C. Cir. 1976) ("plainly expressed purpose of Congress [is] to require nationally uniform . . . limitations").

17 Clean Water Act § 304(b), 33 U.S.C. § 1314(b) (1982). For an explanation of effluent limitations and the EPA's duties under § 304, see 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.03[4] (1986). *Cf.* Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 709 (D.C. Cir. 1974) (as modified 1975) (effluent standards intended to safeguard against industries' threats to relocate).

18 Clean Water Act § 301(a), 33 U.S.C. § 1311(a) (1982). *See, e.g.,* United States v. Cutter Laboratories, Inc., 413 F. Supp. 1295 (E.D. Tenn. 1976).

19 *See, e.g.,* Clean Water Act § 101(b), 33 U.S.C. § 1251(b) (1982) (pollution prevention is primary responsibility of states); *id.* § 402(c)(3), 33 U.S.C. § 1342(c)(3) (EPA may withdraw state's authority to issue discharge permits if state fails to enforce standards). If the Administrator finds that a person has violated an effluent standard or any other condition of the Act, the Administrator may notify the person and the affected state. If the state fails to bring an enforcement action within 30 days, the EPA may proceed with enforcement itself. *Id.* § 309(a)(1), 33 U.S.C. § 1319(a)(1) (1982).

20 During the House debates on the 1972 amendments to the Federal Water Pollution Control Act, Rep. Podell noted that "[i]nterstate competition for . . . industrial investment, with its emphasis on noninterference, . . . flexible environmental policies and languid enforcement, is well known . . . [and the] pressures may be too strong for economically conscious State officials to resist." 118 CONG. REC. 10,661 (1972), *reprinted in* CLEAN WATER HISTORY, *supra* note 16, at 575.

tended through the Act to ensure uniform minimum standards nationwide.[21]

Section 402 of the Act establishes the basic mechanism for enforcing the effluent standards—the National Pollutant Discharge Elimination System (NPDES).[22] Section 402 authorizes the EPA to issue permits allowing discharge of pollutants at or below the promulgated standards.[23] Each permit effectively translates the general effluent standards into specific discharge limitations.[24]

The Act allows delegation of the permit program to states that demonstrate the capacity to administer their own State Pollutant Discharge Elimination System (SPDES).[25] Approval of a state's program requires that it demonstrate adequate authority under state laws to administer the program, including authority to issue and enforce permits.[26] If state laws or enforcement become too lenient, the EPA may withdraw a state's permitting authority.[27] In addition, the EPA may bring enforcement actions against individuals who violate either their state permit or the federal effluent standards.[28] Thus, ultimate enforcement authority remains with the federal government.

---

21 States are free to establish more stringent effluent standards or enforcement procedures. Clean Water Act § 510, 33 U.S.C. § 1370 (1982).

22 33 U.S.C. § 1342 (1982). The NPDES is a codification of the permit program previously established by regulation under the Rivers and Harbors Act, ch. 425, § 13, 30 Stat. 1121, 1152 (1899) (current version at 33 U.S.C. § 407 (1982)). *See* Exec. Order No. 11,574, 3 C.F.R. 556 (1971), *reprinted in* 33 U.S.C. § 407 app. at 638-39 (1982); Clean Water Act § 402(a)(4)-(5), 33 U.S.C. § 1342(a)(4)-(5) (1982) (indicating that § 402 supports the § 407 permit scheme).

23 33 U.S.C. § 1342(a)(1) (1982). Section 301(a) of the Act articulates the policy that no discharge is allowed except under permits approved by the Act. 33 U.S.C. § 1311(a) (1982). The NPDES permits are such permits. *Id.*

24 The NPDES permit sets forth limitations on the amount of certain pollutants a source may discharge. NPDES permits require that each permittee monitor its discharge and submit Discharge Monitoring Reports (DMRs) to the issuing agency at periodic intervals. DMRs thus indicate whether the permittee violated the permit limits during the reporting period. In addition to monitoring and reporting requirements and effluent limitations, NPDES permits may impose other constraints deemed necessary by the issuing agency. *See* EPA Administered Permit Programs: The National Pollutant Discharge Elimination System, 40 C.F.R. § 122 (1986); Clean Water Act § 402(a)(2), 33 U.S.C. § 1342(a)(2) (1982).

25 Clean Water Act § 402(b), 33 U.S.C. § 1342(b) (1982).

26 *Id.* The EPA has approved 36 state and one territory permit programs. *States Having Approved Programs for the National Pollutant Discharge Elimination System (NPDES),* [1 State Water Laws] Env't Rep. (BNA) 611:0111 (Dec. 7, 1984).

27 *See* Clean Water Act § 402(c)(3), 33 U.S.C. § 1342(c)(3) (1982); *see also* Kentucky v. Train, 9 Env't Rep. Cas. (BNA) 1280 (E.D. Ky. 1976) (overturning state standards less stringent than those required by Act).

28 *See generally* Clean Water Act § 309(a)(1)-(3), 33 U.S.C. § 1319(a)(1)-(3) (1982) (EPA may take action when state has failed). *See also id.* § 402(i), 33 U.S.C. § 1342(i) (1982) ("Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to [Clean Water Act § 309] section 1319 of this title.").

2. *The Citizen Suit Provision*

As a supplement to federal and state enforcement, section 505 of the Act provides for private enforcement via citizen suits.[29] Modeled closely upon the citizen suit provision in the Clean Air Act,[30] section 505 empowers a citizen to act as a private attorney general[31] to vindicate public rights. The citizen cannot, however,

---

29 Section 505, as codified, provides in part:

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to preform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty . . . and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced —

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action . . . to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, ...

(c) Venue; intervention by Administrator

. . . .

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

33 U.S.C. § 1365 (1982).

30 42 U.S.C. § 7604 (1982); *see* S. REP. No. 414, 92d Cong., 1st Sess. 79 (1971) (citizen suit provision modeled after that in Clean Air Act), *reprinted in* CLEAN WATER HISTORY, *supra* note 16, at 1415, 1497.

Because the citizen suit originated with the Clean Air Act of 1970, courts routinely rely on its legislative history in construing the citizen suit provision of the Clean Water Act. *See, e.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Assoc., 453 U.S. 1, 18 n.27 (1981); Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 699-702 (D.C. Cir. 1974) (as modified 1975). Courts also rely on cases involving citizen suits under both statutes when considering citizen suits under one of them. *See, e.g.*, Student Pub. Interest Research Group of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc., 759 F.2d 1131, 1135-37 & 1136 n.4 (3d Cir. 1985) (using cases involving citizen suits under Clean Air Act to interpret citizen suit provision of Clean Water Act).

31 *See* H.R. REP. No. 911, 92d Cong., 2d Sess. 134 (definition of "citizen" based on "private attorney general" doctrine), *reprinted in* CLEAN WATER HISTORY, *supra* note 16, at 753, 821. *See generally* Mashaw, *Private Enforcement of Public Regulatory Provisions: The "Citizen Suit,"* 4 CLASS ACTION REP. 29 (1975).

recover damages for his or her own injury.

The citizen suit provision grants limited jurisdiction to private enforcers.[32] It authorizes a citizen to sue any person violating either an "effluent standard or limitation"[33] or an order of the Administrator or the state.[34] In addition, a citizen may challenge purely nondiscretionary actions of the Administrator.[35] The citizen must give the alleged violator, the EPA, and the state sixty days notice before commencing a suit.[36] Diligent prosecution during this period by the state or EPA preempts citizen enforcement.[37] Section 505 allows a citizen to seek an injunction or an assessment of penalties.[38] Section 505 does not, however, create a private right of action to collect damages; penalties are payable to the United States treasury, not to

---

32 The Supreme Court has noted that the Senate reports concerning the 1972 Clean Water Amendments "placed particular emphasis on the limited nature of the citizen suits being authorized." Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 17 n.27 (1981). To prevent a flood of citizen suits, Congress specifically made no provision for damages to individuals, limiting the type of relief that citizens could seek to civil penalties and injunctive relief. *See id.* (citing legislative history).

33 Clean Water Act § 505(a)(1)(A), 33 U.S.C. § 1365(a)(1)(A) (1982). The term "effluent standard or limitation" for the purpose of citizen suits under the Act is defined in *id.* § 505(f), 33 U.S.C. § 1365(f) (1982). In general, "citizens may enforce against discharges which lack . . . §§ 402 [NPDES/SPDES] or 404 [dredge and fill] permits; violations of . . . §§ 402 or 404 permits; and violations of new source, toxic pollutant, and pretreatment standards. They may not enforce against . . . § 311 oil or hazardous materials spill requirements and prohibitions; . . . § 312 marine sanitation device requirements; or . . . § 405 sludge disposal and permit requirements." Miller, *supra* note 2, at 10,320-21 (footnotes omitted).

34 Clean Water Act § 505(a)(1)(B), 33 U.S.C. § 1365(a)(1)(B) (1982).

35 *Id.* § 505(a)(2), 33 U.S.C. § 1365(a)(2) (1982).

In general, the Administrator's enforcement decisions are discretionary and citizen suits therefore cannot compel administrative enforcement action. *See, e.g.*, City of Seabrook v. Costle, 659 F.2d 1371 (Former 5th Cir. Unit A Oct. 1981); Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976). *But see* South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118 (D.S.C. 1978) (allegations that EPA Administrator had duty to enjoin construction of dam stated claim for relief); Illinois *ex rel.* Scott v. Hoffman, 425 F. Supp. 71 (S.D. Ill. 1977) (denying Administrator's summary judgment motion in suit against him seeking to restore river via injunctive relief). The courts have, however, allowed citizen suits to make the EPA withdraw permitting authority from a state not actively enforcing the water laws. *See, e.g.*, Rivers Unlimited v. Costle, 11 Env't Rep. Cas. (BNA) 1681 (S.D. Ohio 1978) (suit to compel enforcement of Ohio SPDES permit program).

36 Clean Water Act § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A) (1982).

37 *Id.* § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (1982). The circuits disagree as to whether "diligent prosecution" requires court action or only administrative action. For an analysis of this issue and case citations, see Polebaum & Slater, *supra* note 12.

38 Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (1982). The penalties are the same as those allowed under the federal enforcement section, *id.* § 309(d), 33 U.S.C. § 1319(d) (1982). Only the Clean Water Act authorizes penalties when citizens sue under environmental statutes. The legislative history does not explain this aberration. *See* Miller, *supra* note 2, at 10,319.

the private plaintiff.[39]

Congress designed the citizen suit primarily as a means of prompting government enforcement and only incidentally as an alternative enforcement mechanism.[40] By requiring that a citizen notify the government before filing suit,[41] Congress sought to trigger administrative action and thus avoid the necessity of judicial involvement.[42] Congress promoted enforcement uniformity by providing identical standards and remedies for EPA and citizen suits under the Act;[43] whether the plaintiff is a private party or the federal agency, the court may impose penalties authorized under section 309(d)[44] or issue an injunction against continuing violations.[45] The

---

39 Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (1982); *see also* Sierra Club v. SCM Corp., 580 F. Supp. 862 (W.D.N.Y.) (no private right of action for damages; all fines accrue to federal government), *aff'd*, 747 F.2d 99 (2d Cir. 1984); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135 (E.D. Pa. 1982) (same).

40 Senator Muskie explained that "[a]lthough the Senate did not advocate these [citizen] suits as the best way to achieve enforcement, it was clear that they should be an effective tool." 116 CONG. REC. 42,382 (1970), *reprinted in* CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, 93D CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 127 (1974) [hereinafter CLEAN AIR HISTORY]; *see also* S. REP. No. 1196, 91st Cong., 2d Sess. 36-37 ("Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations . . . should motivate governmental . . . enforcement and abatement proceedings."), *reprinted in* CLEAN AIR HISTORY, *supra*, at 397, 436-37.

Critics of the provision feared that such suits would flood the courts and interfere with the enforcement role of the executive branch. *See, e.g.*, 116 CONG. REC. 32,923-26 (1970) (statement of Sen. Hruska), *reprinted in* CLEAN AIR HISTORY, *supra*, at 273-79. For a reply to Sen. Hruska, see *id.* at 33,104-05 (statement of Sen. Hart), *reprinted in* CLEAN AIR HISTORY, *supra*, at 355-57.

41 Clean Water Act § 505(b)(1)(A)(i), 33 U.S.C. § 1365(b)(1)(A)(i) (1982).

42 Senator Muskie explained that the reason for the notice provision was "that [the citizen] might trigger administrative action to get the relief that he might otherwise seek in the courts." 116 CONG. REC. 32,927 (1970), *reprinted in* CLEAN AIR HISTORY, *supra* note 40, at 280. Senator Hart agreed, recognizing that notice would "have the effect of prodding [state and federal pollution] agencies to act. In many cases, it is hoped, they will be able to act without resorting to the courts." *Id.* at 33,104, *reprinted in* CLEAN AIR HISTORY, *supra* note 40, at 355. *See also* City of Highland Park v. Train, 519 F.2d 681, 690-91 (7th Cir. 1975) ("Congress intended to provide for citizens' suits in a manner that would be least likely to clog . . . federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief.").

43 Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (1982) (in citizen suits, just as in EPA-filed actions, district courts are authorized to enforce Act and apply penalties authorized under *id.* § 309(d), 33 U.S.C. § 1319(d) (1982), the federal enforcement section); *see also infra* notes 100-10 and accompanying text; *cf.* Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331, 337 (4th Cir. 1983) (under citizen suit provision, 42 U.S.C. § 6972 (1982 & Supp. III 1985), of Resource Conservation and Recovery Act of 1976, district court authorized to enforce RCRA regulations or orders, presumably to full extent of court's powers); Friends of the Earth v. Carey, 535 F.2d 165, 173 (2d Cir. 1976) (district courts obligated to issue appropriate enforcement orders—injunctions—once citizen plaintiff has demonstrated that state has violated Clean Air Act).

44 33 U.S.C. § 1319(d) (1982) (civil penalties not to exceed $10,000 per day of violation).

45 Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (1982). The Act authorizes

citizen-plaintiff is a surrogate for the EPA: he or she enforces the Act where the state has failed and obtains the same remedies as the Agency.

B. Statutes of Limitations

1. *Purposes Served by Statutes of Limitations*

Courts and commentators generally give three reasons for statutes of limitations: (1) to ensure fairness to the defendant, (2) to enhance the effectiveness and efficiency of the courts, and (3) to promote societal stability.[46] Fairness to the defendant is the primary reason given for limiting the life of an action.[47] Statutes of limitations are said to promote justice by balancing the right of the plaintiff to assert "a just claim" against the right of the defendant "to be free of stale claims."[48] The theory stresses the unfairness of leaving a defendant indefinitely under the threat of a lawsuit.[49]

Courts also have an interest in limiting the period in which a plaintiff may bring an action. Allowing claims to languish until "evidence has been lost, memories have faded, and witnesses have disappeared"[50] frustrates the factfinding process. In addition, a time limit on claims conserves judicial resources by eliminating old and tenuous claims.[51]

Finally, limitations on the timeliness of lawsuits contribute to societal stability. Many people may be reluctant to deal with those

---

courts "to enforce" those requirements which have been violated. Courts have primarily enforced these requirements by issuing injunctions. *See* Miller, *supra* note 4, at 10,075-79 (listing relevant cases and discussing injunctions under environmental statutes); *see also* Weinberger v. Romero-Barcelo, 456 U.S. 305, 316 (1982) (courts retain their equitable power to impose injunctive relief under Clean Water Act).

46 For discussions of the reasons for placing temporal limits on causes of action, see Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965); Callahan, *Statutes of Limitation—Background,* 16 OHIO ST. L.J. 130 (1955); *Developments in the Law—Statutes of Limitations,* 63 HARV. L. REV. 1177, 1185-86 (1950) [hereinafter *Developments*]; Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations,* 65 CORNELL L. REV. 1011 (1980).

47 *Developments, supra* note 46, at 1185; Note, *Accrual Dilemma: Statutes of Limitations in Hazardous Waste Cases,* 45 ALB. L. REV. 717, 718 (1981).

48 Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944).

49 *See* Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1805) (unfair for defendant to "remain forever liable to a pecuniary forfeiture"); *Developments, supra* note 46, at 1185 (defendant has reasonable expectation that "the slate has been wiped clean of ancient obligations").

50 Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944).

51 *See* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965) ("[C]ourts ought to be relieved of the burden of trying stale claims . . . ."); *Developments, supra* note 46, at 1185 (statutes of limitations increase effectiveness of courts); *cf.* Callahan, *supra* note 46, at 135 (arguing that limitation periods are devices to save the court's time and, conversely, that they are meant to serve fairness rather than efficiency).

whose status is uncertain because of unsettled claims. Statutes of limitations minimize this uncertainty.[52]

2. *Limitation Borrowing in Federal Courts*

When a federal law fails to specify a statute of limitations,[53] federal courts borrow an analogous state limitation period[54] or a period found elsewhere in federal law,[55] or decide that the time for bringing an action is unlimited.[56] Most often, courts borrow a limitation period from an analogous state law.[57] Courts justify such borrowing as the appropriate interpretation of congressional intent[58] or as required by the Rules of Decision Act.[59]

Although borrowing a state limitation period remains the general rule, the Supreme Court has often held that federal courts should not mechanically apply the rule.[60] In *Occidental Life Insurance Co. v. EEOC,*[61] for example, the Court ruled that state time limits should not be applied to federal statutory actions if such application is inconsistent with the statute's underlying national policies.[62] The Court reasoned that "[s]tate legislatures do not devise their limita-

---

52 *See Developments, supra* note 46, at 1185-86.

53 For a complete discussion of the alternatives available to federal courts, see Note, *Limitation Borrowing in Federal Courts,* 77 MICH. L. REV. 1127, 1130-46 (1979). In addition to the alternatives discussed *infra*, the Note also discusses "judicially legislated limitations," *id.* at 1131-32, and laches, *id.* at 1141-46.

54 *Id.* at 1134.

55 *Id.* at 1133.

56 *Id.* at 1130.

57 *See, e.g.,* Runyon v. McCrary, 427 U.S. 160, 179-82 (1976) (applying state personal injury limitation period to claim under Civil Rights Act of 1866); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 703-08 (1966) (applying state limitation period for contracts not in writing to claim under Labor Management Relations Act); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397-99 (1906) (applying state catch-all statute of limitations to antitrust claim under Sherman Act); M'Cluny v. Silliman, 28 U.S. (3 Pet.) 270, 277-78 (1830) (applying state limitation period to claim under federal act concerning sale of federal lands).

58 *See, e.g.,* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704 (1966); Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946); *see also* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 174 & n.1 (O'Connor, J., dissenting).

59 The Supreme Court first applied the Rules of Decision Act, 28 U.S.C. § 1652 (1982), to require use of a state statute of limitations in M'Cluny v. Silliman, 28 U.S. (3 Pet.) 270 (1830). The Court has since limited the Act's application when adjudicating federally created rights. *See DelCostello,* 462 U.S. at 159 n.13. *See generally* Special Project, *supra* note 46, at 1024-42 (discussion that early interpretation of Rules of Decision Act required applying state limitation periods to federal claims).

60 *See, e.g., DelCostello,* 462 U.S. at 161; Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977); Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1975); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 706-07 (1966).

61 432 U.S. 355 (1977).

62 *Id.* at 367 (citing Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1975)); *see also* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 706-07 (1966) ("[T]he characterization that [the state] law imposes upon this [federal] action does not lead to any conflict with federal labor policy.").

tions periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies."[63]

Applying this reasoning in *DelCostello v. International Brotherhood of Teamsters,*[64] the Supreme Court approved application of an analogous federal limitation period to a federal statutory claim.[65] In an action under the federal Labor Management Relations Act (LMRA),[66] the Court rejected the suggested state limitation period and adopted a longer time period provided elsewhere in the LMRA but not specifically applicable to the hybrid claim before the Court.[67] Although recognizing that borrowing state law remains the general practice,[68] the Court nevertheless stated that courts should not feel inextricably bound to this practice "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking."[69]

Finally, courts view dispensing with a time limit for a cause of action as undesirable.[70] When a cause of action lives forever, the legal system forgoes the benefits of fairness, stability, and efficiency that limitation periods provide.[71] Moreover, although many federal statutes are unlimited, Congress has not objected to the general judicial practice of borrowing state limitation periods, a silence which courts have "interpreted [as a] . . . federal policy to adopt the local law of limitation."[72]

---

63 *Occidental Life,* 432 U.S. at 367.

64 462 U.S. 151 (1983).

65 *Id.* at 169.

66 The claim consisted of allegations of breach of contract against the employer under 29 U.S.C. § 185 (1982) and breach of union duty of fair representation.

67 *DelCostello,* 462 U.S. at 169. The court found the analogy to a federal statute of limitations "more apt than any of the suggested state-law parallels." *Id.*

68 *Id.* at 171 ("[R]esort to state law remains the norm . . . .").

69 *Id.* at 172. *Cf.* Mola Dev. Corp. v. United States, No. CV 82-819-RMT(JRx), slip op. at 3 (C.D. Cal. July 30, 1985) (in Superfund case, court, citing *DelCostello,* reasoned that analogous federal time limitation could be found, but because analogous federal and state periods were identical, court did *not* specify which it would choose).

70 *See supra* note 49. Chief Justice Marshall warned that having no limitation on rights of action would be "utterly repugnant to the genius of our laws." Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1805) (dictum).

71 *See supra* notes 46-52 and accompanying text.

72 Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946); *see DelCostello,* 462 U.S. at 158 (absent federal statute of limitations, "we do not ordinarily assume that Congress intended that there be no time limit on actions at all"); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704 (1966) (if Congress disagrees with practice of borrowing state limitation periods, it can act to overturn that practice); Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir.) (although Congress may create federal right without limitation

3. *The Federal Statute of Limitations for Penalties*

The federal generic statute of limitations for penalties,[73] which courts have applied to some EPA actions under the Act,[74] also merits consideration as an appropriate timeliness rule for citizen suits. Through this provision, Congress created an exception to the general rule exempting the sovereign from statutes of limitations.[75] Statutes specifically limiting actions by the United States place the government in the same position as private parties, eliminating the inequities resulting from government immunity from time limitations.[76]

The courts have applied section 2462 to penalty and forfeiture actions brought by the government under a host of federal statutes,[77] including the Clean Water Act.[78] Courts narrowly construe section 2462 to apply "only to actions on behalf of the United States and *qui tam* actions."[79] The same statute of limitations should gov-

---

period it does not intend that courts apply an unlimited period), *cert. denied,* 368 U.S. 821 (1961); *see also* Einhorn & Feldman, *Choosing a Statute of Limitations in Federal Securities Actions,* 25 MERCER L. REV. 497, 497 (1974); Special Project, *supra* note 46, at 1039; Note, *supra* note 53, at 1131, 1140.

73 28 U.S.C. § 2462 (1982) provides that "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years . . . ."

74 *See infra* note 78 and accompanying text.

75 *See, e.g.,* United States v. Summerlin, 310 U.S. 414 (1940) (generally sovereign is exempt from limitation statutes); United States v. Weaver, 207 F.2d 796, 798 (5th Cir. 1953) (§ 2462 is exception to general immunity of sovereign).

76 *See* United States v. Franklin Nat'l Bank, 376 F. Supp. 378, 383 (E.D.N.Y. 1973) (reason for federal statute of limitations for contract actions is to eliminate unfairness). For a discussion of the purposes and applicability of federal limitations, including § 2462, see S. REP. No. 1328, 89th Cong., 2d Sess. (1966) (report on adoption of § 2415, federal statute of limitations for tort and contract actions), *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2502.

77 *See, e.g.,* United States v. Core Laboratories, Inc., 759 F.2d 480, 481 (5th Cir. 1985) (Export Administration Act); United States v. Advance Mach. Co., 547 F. Supp. 1085, 1089-91 (D. Minn. 1982) (Consumer Product Safety Act); United States v. Firestone Tire & Rubber Co., 518 F. Supp. 1021, 1036-37 (N.D. Ohio 1981) (Gold Act); FTC v. Lukens Steel Co., 454 F. Supp. 1182, 1185 n.2 (D.D.C. 1978) (Federal Trade Commission Act); United States v. Argonaut Line, Inc., 33 F. Supp. 833, 834 (S.D.N.Y. 1940) (applying § 2462's predecessor to federal shipping laws).

78 *See* United States v. C & R Trucking Co., 537 F. Supp. 1080, 1083 (N.D. W. Va. 1982) (suit by EPA under § 311 of Act); *cf.* United States v. Outboard Marine Corp., 104 F.R.D. 405, 409 (N.D. Ill. 1984) (dictum) (EPA suggests § 2462 bars suit under § 309 of Act), *rev'd on other grounds,* 789 F.2d 497 (7th Cir.), *cert. denied,* 107 S. Ct. 457 (1986); United States v. Central Soya, Inc., 697 F.2d 165, 169 (7th Cir. 1982) (suit by EPA under Rivers and Harbors Act, Clean Water Act's predecessor).

79 Bertha Bldg. Corp. v. National Theatres Corp., 269 F.2d 785, 788-89 (2d Cir. 1959) (suit for treble damages under federal antitrust laws), *cert. denied,* 361 U.S. 960 (1960); *see also* Payne v. A.O. Smith Corp., 578 F. Supp. 733, 736 n.3 (S.D. Ohio 1983) (§ 2462 does not govern suit brought by private individual for damages under Consumer Product Safety Act); Erie Basin Metal Prods., Inc. v. United States, 150 F. Supp.

ern suits seeking to impose the same penalty, whether the suit is *qui tam* or brought by the government, "because they are equally brought to enforce the criminal law of the State."[80]

Courts have historically refused to expand section 2462, beyond *qui tam* actions, to include actions for recovery of damages by private parties.[81] The words "fine, penalty, or forfeiture" in section 2462 refer to a punishment imposed as a sanction for violation of federal law. Punishment unrelated to the plaintiff's loss but exacted for some act of the defendant is considered punitive.[82] Penalties never include liability imposed as damages or as compensation for an injury.[83]

C. Conflict in the District Courts over the Proper Limitation Period for Citizen Suits

Recent enforcement actions in Maryland, New York, New Jersey, Connecticut, and California presented district courts with the need to select the proper limitation period under the Act.[84] In

---

561, 566 (Ct. Cl. 1957) (§ 2462 applies only to actions instituted by United States, not to claims by contractor against United States).

A *qui tam* action is brought by an informer under a statute which establishes a penalty for its violation. The informer recovers a share of the penalty; the remainder goes to the government. *See* Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81, 83-84 (2d Cir. 1972) (defines *qui tam*).

80 *See* Huntington v. Attrill, 146 U.S. 657, 673 (1892) (actions by common informer to recover penalty may stand on same ground as suits brought by state); *see also* Adams v. Woods, 6 U.S. (2 Cranch) 336 (1805) (same time limits apply to *qui tam* actions as to those brought by state).

81 Meeker v. Lehigh Valley R.R., 236 U.S. 412, 423 (1915) (§ 2462's predecessor does not apply to action brought by shipper for damages under act regulating commerce); Bertha Bldg. Corp. v. National Theatres Corp., 269 F.2d 785, 788-89 (2d Cir. 1959) (§ 2462 inapplicable in suit for treble damages under antitrust laws), *cert. denied*, 361 U.S. 960 (1960); Payne v. A.O. Smith Corp., 578 F. Supp. 733, 736 n.3 (S.D. Ohio 1983) (§ 2462 does not apply to private action for damages under Consumer Product Safety Act); Erie Basin Metal Prods., Inc. v. United States, 150 F. Supp. 561, 566 (Ct. Cl. 1957) (§ 2462 does not apply to action by contractor to recover damages from United States).

82 For a discussion of the meaning of "penalty," see generally Huntington v. Attrill, 146 U.S. 657, 666-76 (1892); United States v. Witherspoon, 211 F.2d 858, 860-61 (6th Cir. 1954); American Fidelity & Casualty Co. v. G. A. Nichols Co., 173 F.2d 830, 833 (10th Cir. 1949).

83 *See, e.g.*, United States v. Hougham, 364 U.S. 310, 313 (1960) (United States recovery under Surplus Property Act is "liquidated damages," not a penalty); United States v. Perry, 431 F.2d 1020, 1024-25 (9th Cir. 1970) (recovery under Anti-Kickback Act is compensatory; it only makes government whole).

84 *See* Student Pub. Interest Research Group of N.J., Inc. v. P.D. Oil & Chem. Storage, Inc., 627 F. Supp. 1074 (D.N.J. 1986); Sierra Club v. Union Oil Co., 16 Envtl. L. Rep. (Envtl. L. Inst.) 20,005 (N.D. Cal. 1985); Connecticut Fund for the Env't v. Job Plating Co., 623 F. Supp. 207 (D. Conn. 1985); Student Pub. Interest Research Group of N.J., Inc. v. AT & T Bell Laboratories, 617 F. Supp. 1190 (D.N.J. 1985); Sierra Club v. Simkins Indus., Inc., 617 F. Supp. 1120 (D. Md. 1985); Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440 (D. Md. 1985); Student Pub. Interest Research

each case, environmental groups alleged that the defendant industry continually exceeded limitations specified in its discharge permit, violating section 301(a) of the Act.[85] The respective plaintiffs filed their actions under the citizen suit provision;[86] each sought injunctive relief and civil penalties. The defendants responded by moving for partial summary judgment, pleading the statute of limitations as a defense. The defendants asserted that, absent a limitation period in the Act, the courts should borrow state statutes of limitations applicable to penalties or forfeitures.[87] Before reaching the statute of limitations issue, the courts first rejected the argument that the use of the present tense ("in violation") in section 505(a)(1) meant that citizens could only sue for ongoing, as opposed to past, violations.[88]

Five district courts applied section 2462's five-year statute of limitations as the most appropriate limitation period.[89] The courts'

Group of N.J., Inc. v. Tenneco Polymers, Inc., 602 F. Supp. 1394 (D.N.J. 1985); Student Pub. Interest Research Group of N.J., Inc. v. Monsanto Co., 600 F. Supp. 1474 (D.N.J. 1985); Friends of the Earth v. Facet Enters. Inc., 618 F. Supp. 532 (W.D.N.Y. 1984); Student Pub. Interest Research Group of N.J., Inc. v. Anchor Thread Co., 22 Env't Rep. Cas. (BNA) 1150 (D.N.J. 1984).

85 33 U.S.C. § 1311(a) (1982).

86 Clean Water Act § 505, 33 U.S.C. § 1365 (1982).

87 *See P.D. Oil,* 627 F. Supp. at 1084 (urging use of New Jersey two-year statute of limitations applicable to forfeitures under penal statute); *AT & T,* 617 F. Supp. at 1202 (same); *Tenneco,* 602 F. Supp. at 1398 (same); *Monsanto,* 600 F. Supp. at 1477 (same); *Anchor Thread,* 22 Env't Rep. Cas. (BNA) at 1154 (same); *Job Plating,* 623 F. Supp. at 211 (urging use of Connecticut's one-year limitation for penalty actions or three-year limitation for nuisance); *Simkins,* 617 F. Supp. at 1124 (urging application of Maryland's one year limitation period for penalty suits); *Bethlehem Steel,* 608 F. Supp. at 447 (same); *Facet Enterprises,* 618 F. Supp. at 535 (defendant claims that either federal five-year statute of limitations for penalties, 28 U.S.C. § 2462 (1982), or New York's three-year limitation for penalties applies).

In *Union Oil,* however, the defendants did not encourage the court to adopt a state statute of limitations. Rather, they successfully argued that § 2462 applied and barred liability for violations which had occurred more than five years before the action commenced. 16 Envtl. L. Rep. (Envtl. L. Inst.) at 20,006.

88 *See, e.g., AT & T,* 617 F. Supp. at 1194-99. This interpretation of the words "in violation" is significant. If we assume a five-year statute of limitations, this interpretation allows citizens to sue for any violations which occurred within the past five years even if the discharge has since stopped or has been brought into compliance with the relevant standards. Any violations that occurred prior to the five-year period are protected by the statute of limitations. For example, suppose a discharger committed violations for six years but has complied for the past four years. A citizen could sue for only the last year of violation; the previous five years of violations are outside the time limit.

The courts consistently refuse to apply state limitation periods because doing so would violate the Act's underlying policies of consistency and uniformity. *See id.* at 1202-03; *Simkins,* 617 F. Supp. at 1124-25; *Bethlehem Steel,* 608 F. Supp. at 447; *Tenneco,* 602 F. Supp. at 1398-99; *Monsanto,* 600 F. Supp. at 1477; *Anchor Thread,* 22 Env't Rep. Cas. (BNA) at 1154; *infra* notes 124-29 and accompanying text. The court in *Facet Enterprises* reserved the choice-of-law issue. 618 F. Supp. at 536 n.2.

89 *See Union Oil,* 16 Envtl. L. Rep. (Envtl. L. Inst.) at 20,006; *Job Plating,* 623 F. Supp. at 213; *Simkins,* 617 F. Supp. at 1125; *Bethlehem Steel,* 608 F. Supp. at 450; *Facet Enterprises,* 618 F. Supp. at 536.

reasoning paralleled that employed in *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*[90] First, the court found that section 2462 almost certainly applies to EPA actions under the Act.[91] Second, it reasoned that fulfilling the congressional goal of consistent enforcement between EPA and citizen suits requires that citizen actions meet the same five-year limit.[92] The court noted that the similarity of citizen suits to *qui tam* actions further supported its decision to apply section 2462.[93]

Five New Jersey district courts concluded that no statute of limitations applies to citizen suits under the Act.[94] The general analysis followed by these courts is outlined in *Student Public Interest Research Group of New Jersey, Inc. v. AT & T Bell Laboratories*.[95] First, the court cited the "dearth of authority for applying the federal five-year limit to either citizen suits or EPA actions."[96] Next it noted that, under New Jersey law, the New Jersey Department of Environmental Protection could bring an enforcement action at any time.[97] The court concluded that "[i]f the five-year federal statute of limitations were applied to citizen suits, . . . they would be hampered in a way state efforts are not, and the clear policy favoring uniformity in enforcement would be thwarted."[98] Without clearly reaching the issue with regard to EPA actions, the court decided that citizen suits should have no time limits.[99]

In choosing an appropriate statute of limitations, each group of courts focused on Congress's desire for uniform and consistent enforcement. The New Jersey courts emphasized consistency between state and citizen enforcement. The others required consistency between federal and citizen enforcement. The different focuses produced different results.

---

90 608 F. Supp. 440 (D. Md. 1985).

91 *Id.* at 448. The court cited United States v. Central Soya, Inc., 697 F.2d 165, 169 (7th Cir. 1982), and United States v. C & R Trucking Co., 537 F. Supp. 1080, 1083 (N.D. W. Va. 1982), as examples where courts applied § 2462 to punitive actions under the environmental laws.

92 *Bethlehem Steel,* 608 F. Supp. at 448-49.

93 *Id.* at 449-50.

94 *See P.D. Oil,* 627 F. Supp. at 1084-85; *AT & T,* 617 F. Supp. at 1203; *Tenneco,* 602 F. Supp. at 1399; *Monsanto,* 600 F. Supp. at 1477-78 (relying on *Tenneco* without discussing § 2462's applicability); *Anchor Thread,* 22 Env't Rep. Cas. (BNA) at 1154.

95 617 F. Supp. 1190 (D.N.J. 1985).

96 *Id.* at 1203.

97 *Id.*

98 *Id.*

99 *Id.*

II
CHOOSING A STATUTE OF LIMITATIONS UNDER THE CLEAN WATER ACT

The conflict between the district courts should be resolved in a manner consistent with the purpose and policies underlying the Clean Water Act. The first question is whether the same limitation period should apply to citizen and federal government suits. The second is whether the courts should apply the federal generic penalty statute or leave the time to bring enforcement actions unlimited.

A. The Same Time Limitation Should Apply to Both Citizen and Federal Government Suits

The statutory language and legislative history of the citizen suit provision compel the application of the same statute of limitations to both citizen and federal government suits. Application of different time constraints would frustrate Congress's intent that citizen and EPA enforcement be consistent, and that citizen suits not interfere unduly with the EPA's enforcement discretion. The Act's provision of identical remedies for EPA and citizen suits further suggests that the same time constraints should apply to both types of action. Finally, the Act does not mandate identical state and citizen enforcement.

Congress clearly intended consistent enforcement of both government and citizen actions under the Act.[100] The Senate report states that "standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same. Therefore the participation of citizens in the courts seeking enforcement of water pollution control requirements should not result in inconsistent policy."[101] Although this passage refers to substantive enforcement standards, such as effluent limitations, "inconsistent policy" would also result if different procedural rules governed private and government actions. In short, the extent of liability under the Act would vary depending upon who brought suit.

Consider the result if a longer limitation period governed a citizen plaintiff than governed a government plaintiff. The Act authorizes civil penalties "not to exceed $10,000 per day of . . . violation";[102] a citizen given a longer period in which to sue could

100 *See supra* notes 43-45 and accompanying text.

101 S. REP. No. 414, 92d Cong., 1st Sess. 80, *reprinted in* CLEAN WATER HISTORY, *supra* note 16, at 1415, 1498.

102 Clean Water Act § 309(d), 33 U.S.C. § 1319(d) (1982).

ask that the court impose much higher total penalties. A violator would therefore have an advantage if sued by the government rather than by a citizen. Similarly, the government would prefer to let a citizen sue because greater penalties, payable to the United States, would result. Conversely, if a shorter time limit applied to a citizen's suit, the government would have the enforcement advantage. Either situation would result in inconsistent enforcement and undermine Congress's clear intent.

In addition, Congress did not want citizen suits to interfere with the government's enforcement discretion.[103] Imposing a shorter time limit on citizens than on the EPA would force a private individual suing under the Act "to give notice almost immediately after a particular incident of non-compliance had occurred,"[104] rather than waiting to see whether administrative enforcement would prove adequate.[105] A short time limit for citizens would compel the EPA to respond to citizen actions rather than set its own enforcement priorities.[106] Concurrent time periods for citizen and EPA actions would decrease the opportunity for interference with federal discretion, yet preserve the triggering effect of private suits. A citizen could wait for the EPA to prompt state action or to bring a federal enforcement action. If EPA action were not forthcoming, the individual could commence a citizen suit. Because the Act requires that a citizen notify the EPA and the state sixty days before filing suit,[107] the EPA has ample opportunity to initiate enforcement proceedings of its own.

Section 505's language and the Act's structure further support adopting the same statute of limitations for both citizen suits and EPA enforcement actions. Section 505 explicitly authorizes the district courts "to apply any appropriate civil penalties" under the fed-

---

103 *See supra* notes 40-42 and accompanying text; *infra* note 106.

104 Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440, 448 (D. Md. 1985).

105 Save Our Sound Fisheries Ass'n v. Callaway, 429 F. Supp. 1136, 1143 (D.R.I. 1977) ("Congress put strong reliance on administrative enforcement, generally allowing citizen enforcement only after the Administrator had an opportunity to [exercise] his powers of enforcement . . . ."); *see also supra* notes 40-41 (citizen suits intended to supplement, not displace, administrative enforcement).

106 *See* Mashaw, *supra* note 31, at 33 (citizen suits have potential to undermine prosecutorial discretion); *supra* note 40 and accompanying text. Congress has affirmed this position in recent debate over modifications to the Act. Proposed modifications would require that citizens provide the EPA with copies of all complaints or consent decrees filed under § 505, and would specifically make judgments in such cases nonbinding upon the United States unless it was a party. One proponent of these modifications argued that these provisions "will help to encourage more consistent enforcement settlements [and] maintain the ability of the Government to set its own enforcement priorities." 131 CONG. REC. E3569 (daily ed. July 26, 1985) (statement of Rep. Roe).

107 Clean Water Act § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A) (1982).

eral enforcement section.[108] This cross-referencing of citizen suit penalties to the federal penalty provision suggests that Congress intended that remedies available in citizen suits parallel those available in EPA suits.[109] For comparable penalties to exist, the same temporal limitations should apply to suits brought by private citizens and by the federal government.[110]

The Act does not require procedural congruence between citizen and state enforcement. In *Student Public Interest Research Group of New Jersey, Inc. v. AT & T Bell Laboratories,*[111] the court stated that enforcement actions brought under the Act should not be subject to time limits in order to ensure uniformity and consistency with state enforcement actions that, in some states, are governed by no time bar.[112] This argument is flawed, however, because "[u]niformity [in this context] means identical *minimum standards,*"[113] not absolutely identical pollution control requirements. If they so desire, states may establish more stringent effluent limitations and enforcement procedures than the federal government,[114] and may also authorize citizen enforcement of state statutes.[115] State courts enforce state pollution control laws, however, and state enforcement provisions do not apply to suits brought in federal court under the Act.[116] Congress chose to require procedural consistency among all en-

---

108 *Id.* § 505(a), 33 U.S.C. § 1365(a) (1982). The federal enforcement provision is at *id.* § 309, 33 U.S.C. § 1319 (1982).

109 For example, courts have relied upon the cross-referencing of citizen suit and EPA enforcement penalties to hold that, under the citizen suit provision, penalties for past violations may be imposed in § 505 actions. *See, e.g.,* Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542, 1547-48 (E.D. Va. 1985), *aff'd,* 791 F.2d 304 (4th Cir. 1986), *petition for cert. filed,* 55 U.S.L.W. 3239 (U.S. Sept. 23, 1986) (No. 86-473).

110 *See supra* text accompanying note 102.

In addition, the statute indicates that only those penalties "appropriate" in an EPA suit under Clean Water Act § 309(d), 33 U.S.C. § 1319(d) (1982), are "appropriate" in a citizen suit under *id.* § 505(a), 33 U.S.C. § 1365(a) (1982).

111 617 F. Supp. 1190 (D.N.J. 1985).

112 *Id.* at 1203.

113 *Id.* (emphasis added).

114 *See supra* note 21.

115 Many states have authorized citizen suits under state water pollution control laws. *See, e.g.,* CAL. GOV'T CODE §§ 12600-12612 (West 1980); CONN. GEN. STAT. §§ 22a-14 to -20 (1985); FLA. STAT. ANN. § 403.412 (West 1986); IND. CODE ANN. § 13-6-1-1 to -6 (Burns 1981); MD. NAT. RES. CODE ANN. § 1-501 to -508 (1983); MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (West Supp. 1986); MINN. STAT. ANN. §§ 116B.01-.13 (West 1977 & Supp. 1987); NEV. REV. STAT. § 41.540 (1983); N.J. STAT. ANN. § 2A:35A-1 to -14 (West Supp. 1986); S.D. CODIFIED LAWS ANN. § 34A-10-1 to -15 (1986).

116 A citizen suing under the *federal* citizen suit provision may obtain the relief authorized by the Act; he or she may not sue under the federal statute and ask for relief specified under state law. *See supra* notes 108-09 and accompanying text. State effluent requirements that are more stringent than federal requirements are imported into federal law by the SPDES permit, which the EPA or citizens may enforce. *See* Clean Water Act §§ 309, 505, 33 U.S.C. §§ 1319, 1365 (1982).

forcement actions brought under the Act; it did not require such consistency between similar actions brought under the Act and under state pollution control laws.

Courts should recognize that by bringing legitimate actions under section 505 "citizens [are] performing a public service."[117] They sue as private attorneys general, and any benefit inures to the public or to the United States.[118] Under these circumstances, the policies and structure of the Act demand that courts apply the same statute of limitations to citizen actions and to federal administrative actions.[119] The next step in the analysis is deciding what, if any, time bar is appropriate.

B. Section 2462 Is the Most Appropriate Limitation Period for Enforcement Actions Under the Act

Under section 309 or section 505 of the Act, the courts may decide that the time to bring the action is unlimited, or may borrow an analogous state or federal time limitation.[120] The most appropriate choice is to borrow a timeliness rule from elsewhere in federal law. A federal time bar best serves the policies of uniformity and consistency that underlie the Act.

1. *No Statute of Limitations*

If courts apply no time bar, enforcement suits brought under the Act will threaten the fairness, stability, and efficiency that statutes of limitations provide.[121] While applying no time bar to citizen suits promotes consistency with state enforcement, it flouts Congress's decision to sacrifice consistency between state and citizen enforcement in favor of nationwide uniformity.[122] Furthermore, Congress expressly imposed a time limit on federal statutory penalty actions through section 2462,[123] indicating a clear desire to limit federal causes of action. Therefore, courts should not altogether dispense with a time bar for citizen suits under the Act.

---

117 116 CONG. REC. 42,386 (1970) (exhibit 1, summary of provisions of conference agreement on Clean Air Amendments of 1970), *reprinted in* CLEAN AIR HISTORY, *supra* note 40, at 136.

118 *See supra* note 39 and accompanying text.

119 *See, e.g.*, Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440, 449 (D. Md. 1985) (same limitation should apply to citizen and federal administrative action); Friends of the Earth v. Facet Enters., Inc., 618 F. Supp. 532, 536 (W.D.N.Y. 1984) (same).

120 *See supra* notes 53-72 and accompanying text.

121 *See supra* notes 46-52 and accompanying text.

122 *See supra* notes 111-16 and accompanying text.

123 *See supra* notes 73-83 and accompanying text.

2. *State Statutes of Limitations*

Congress encouraged uniform time limits primarily to prevent states from competing for industry by lowering their pollution control requirements.[124] Borrowing state time limitations would frustrate that aim. Use of state time bars would result in nonuniform enforcement of citizen suits from state to state,[125] and would "allow the industrial equivalent of forum shopping."[126] Recognizing the danger to effective and uniform enforcement of the Act, district courts have consistently refused to apply state time bars to section 505 suits.[127] Instead, they have either drawn timeliness rules from elsewhere in federal law[128] or refrained from applying any time bar.[129]

3. *Application of Section 2462 to EPA Suits*

The federal five-year statute of limitations for penalties[130] is the most appropriate time limitation found in federal law to govern EPA suits under the Act. Through section 2462, Congress explicitly requires the federal goverument to begin actions for "the enforcement of any civil . . . penalty"[131] within five years,[132] unless

---

124 *See supra* note 20 and accompanying text.

125 *See, e.g.*, CAL. CIV. PROC. CODE § 340 (West 1982 & Supp. 1986) (one year); MONT. CODE ANN. § 27-2-211 (1985) (two years); N.Y. CIV. PRAC. L. & R. 213 (McKinney 1972 & Supp. 1986) (six years).

126 118 CONG. REC. 10,206 (1972) (statement of Rep. Harsha), *reprinted in* CLEAN WATER HISTORY, *supra* note 16, at 356; *see also* Student Pub. Interest Research Group of N.J., Inc. v. AT & T Bell Laboratories, 617 F. Supp. 1190, 1202 (D.N.J. 1985) ("The major purpose of the policy favoring uniformity is to prevent states from trying to outbid their neighbors for industries and jobs by maintaining lower pollutions standards."); Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440, 447 (D. Md. 1985) ("If courts were to borrow state statutes of limitations . . . [s]ome states could choose . . . a very brief statute of limitations, and thus be very hospitable to industries that violate the Act, while others could adjust their limitations periods to provide a more hostile attitude towards possible polluters.").

127 *See* cases cited *supra* note 88.

128 *See* cases cited *supra* note 89; *cf.* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 155 (1983) (drawing time limitation from Labor Management Relations Act); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 372 (1977) (applying doctrine of laches in suit brought under Equal Employment Opportunity Act).

129 *See* cases cited *supra* note 94.

130 28 U.S.C. § 2462 (1982).

131 *Id.*

132 *Id.* Both the courts and Congress have construed § 2462's language to mean that the limitation period begins to run on the date of violation. The cases interpreting § 2462 and its predecessors unquestionably support this proposition. *See, e.g.*, United States v. Core Laboratories, Inc., 759 F.2d 480, 482 (5th Cir. 1985) (citing cases). *Contra* United States Dep't of Labor v. Old Ben Coal Co., 676 F.2d 259 (7th Cir. 1982) (under Coal Act, claim accrues after violator fails to pay penalty imposed by administration).

In 1965 Congress indicated approval of this interpretation. A report addressing amendments to the Export Control Act of 1949, contained the following statement:

"otherwise provided by Act of Congress."[133] Actions brought by the EPA under section 309 of the Clean Water Act are within the scope of section 2462.[134]

The purpose and effect of the penalties imposed under the Act are analogous to the circumstances that the five-year statute of limitations is expressly intended to reach. The word "penalty" in section 2462 refers to a sanction imposed for violation of a public law, not a liability imposed as damages for a private injury.[135] The relevant language of the Act fits this definition. Deterrence, not compensation, is the primary goal of the penalties available through section 309 of the Act.[136] Penalties are calculated on the basis of the "economic benefit of noncompliance"[137] and "the seriousness of the violation."[138] Both of these components seek to deter future violations; they do not attempt to compensate for individual or public injury.[139] This penalty is precisely the type to which courts have historically applied the five year time bar.[140]

Government penalty actions are exempt from section 2462 only

> The bill does not prescribe any period following an offense within which the civil penalty must be imposed. It is intended that the general 5-year limitation imposed by section 2462 of title 28 shall govern. *Under that section, the time is reckoned from the commission of the act giving rise to the liability, and not from the time of imposition of the penalty, and it is applicable to administrative as well as judicial proceedings.*

S. REP. No. 363, 89th Cong., 1st Sess. 7 (emphasis added), *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 1826, 1832. *See also Developments, supra* note 46, at 1200-01 (where the act is wrong, regardless of damage, statute of limitations begins to run moment act is committed).

The plaintiff, however, may be entitled to invoke the equitable doctrine of fraudulent concealment to toll the limitation period. *See* Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) ("This equitable doctrine is read into every federal statute of limitation."); Wood v. Carpenter, 101 U.S. 135, 143 (1879) (establishing standards for pleading fraudulent concealment); Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975) (statement of standards for fraudulent concealment). The court will allow a suit to proceed after the limitation period has run if the plaintiff can prove that the defendant has fraudulently concealed the facts forming the basis of the violation, and that the plaintiff was not negligent in failing to discover the violation. *See Holmberg*, 327 U.S. at 396 (unfair to bar claim if defendant's fraud caused delay); *Wood*, 101 U.S. at 139 (doctrine imported from equity).

133 28 U.S.C. § 2462 (1982).

134 *See supra* notes 77-83 and accompanying text.

135 *See supra* notes 81-83 and accompanying text.

136 *See Environmental Protection Agency Civil Penalty Policy*, [Fed. Laws] Env't Rep. (BNA) 41:2991 (Feb. 16, 1984) [hereinafter *EPA Penalty Policy*]. Although this policy does not bind courts, they have used it as a guideline for arriving at civil penalties. *See, e.g.*, Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542, 1556 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3239 (U.S. Sept. 23, 1986) (No. 86-473).

137 *EPA Penalty Policy, supra* note 136, at 41:2992.

138 *Id.*

139 *Id.*

140 *See supra* notes 79-83 and accompanying text.

if Congress states that the particular action is unlimited or provides another time limitation in the underlying statute.[141] The Act contains neither of these exceptions,[142] nor does the legislative history hint at any intent to do so. One court stated that "the general policy of statutes of limitations is so deeply ingrained in our legal system that a period of limitation made generally applicable . . . , as is section 2462, is not to be avoided unless that purpose is made manifestly clear."[143]

Cases decided under the Act support the application of section 2462 to EPA penalty suits. Although courts have not specifically applied the five year time bar to section 309 actions, they have imposed section 2462 and other federal limitation statutes in analogous situations. One district court applied section 2462 in a case brought by the EPA to collect penalties for an oil spill[144] under section 311(b)(6) of the Act.[145] Courts have also applied the federal time limitations for contract[146] and tort[147] actions to EPA cost recovery actions under section 311(f)[148] of the Act. These cases properly concluded that Congress did not exempt the Act from general federal statutes of limitations. Thus, the federal five-year statute of limitations should apply to EPA penalty suits under the Act.

4. *Application of Section 2462 to Citizen Suits*

If federal enforcement actions are limited to five years, this Note's conclusion that the same limitation period should apply to both EPA and citizen's suits requires that courts similarly apply the five-year statute of limitations to citizen suits under the Act. Although courts have not previously applied section 2462 to citizen suits,[149] the historical interpretation of section 2462, the rationale behind that section, and the policies of the Act all support such an application.

Courts have historically refused to apply section 2462 to suits

---

141 *See* 28 U.S.C. § 2462 (1982).

142 *See generally* Clean Water Act §§ 101-518, 33 U.S.C. §§ 1251-1376 (1982 & Supp. III 1985).

143 H.P. Lambert Co. v. Secretary of the Treasury, 354 F.2d 819, 822 (1st Cir. 1965).

144 United States v. C & R Trucking Co., 537 F. Supp. 1080 (N.D. W. Va. 1982).

145 33 U.S.C. § 1321(b)(6) (1982).

146 *See, e.g.*, United States v. P/B STCO 213, 756 F.2d 364, 370 (5th Cir. 1985) (six year contract limitation of 28 U.S.C. § 2415(a) (1982) applied).

147 *See, e.g.*, United States v. The Barge Shamrock, 635 F.2d 1108 (4th Cir. 1980) (noting district court applied three year tort limitation of 28 U.S.C. § 2415(b) (1982) to hold claim time-barred, but reversing district court because claim arose within limitation period), *cert. denied*, 454 U.S. 830 (1981).

148 33 U.S.C. § 1321(f) (1982).

149 *See* Student Pub. Interest Research Group of N.J., Inc. v. AT & T Bell Laboratories, 617 F. Supp. 1190, 1203 (D.N.J. 1985); Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440, 449 (D. Md. 1985).

brought by private parties, except in *qui tam* actions.[150] The cases limiting application of section 2462, however, all arose before the advent of citizen suits.[151] A citizen suit is a perfect analog to a *qui tam* action. In both actions, the plaintiff sues in place of the government to enforce a federal law, and the government collects the penalty in whole or in part. Indeed, the citizen suit is even more similar to a suit by the government than a *qui tam* action because the United States receives the entire penalty. Thus, section 2462 is at least as applicable to the newly developed citizen suit as to the *qui tam* action.

The rationale for limiting government penalty actions[152] applies equally when citizens sue to collect the same penalties. Requiring citizens to bring actions against violators in a timely manner enhances the fairness, efficiency, and effectiveness of the legal system. Moreover, allowing citizens an unlimited time to sue defeats the purpose of imposing limitations on EPA actions. Section 505 permits the United States to intervene in any citizen suit;[153] by intervening in an unlimited citizen suit, the EPA could circumvent Congress's intent that the government sue for penalties within five years.[154]

Congress indicated through section 2462 that federal government penalty actions should be limited.[155] It also intended that penalty actions by both citizens and the federal government under the Act be similarly enforced.[156] Together, these policies suggest that adopting the five year limitation period best implements congressional intent.[157] Furthermore, by applying a time limit, the legal

---

150 *See supra* notes 81-83 and accompanying text.

151 *See* cases cited *supra* notes 79 & 81.

152 *See supra* note 76 and accompanying text.

153 *See* Clean Water Act § 505(c)(2), 33 U.S.C. § 1365(c)(2) (1982).

154 *See supra* notes 130-48 and accompanying text.

155 *See supra* notes 73-83 and accompanying text.

156 *See supra* notes 100-02 and accompanying text.

157 Requiring that enforcement actions under the Act be filed within five years creates a danger that some violations will go unpunished. This danger is offset somewhat by the courts' ability to apply the equitable doctrine of fraudulent concealment. *See supra* note 132. The Supreme Court has confirmed that courts retain their equitable discretion under the Act: "That the scheme [of the act] as a whole contemplates the exercise of discretion and balancing of equities militates against the conclusion that Congress intended to deny courts their traditional equitable discretion in enforcing the statute." Weinberger v. Romero-Barcelo, 456 U.S. 305, 316 (1982). If a court finds that a defendant has misreported or failed to report any information required under the Act, and the violation was not discovered in time to file suit, the court may toll the running of the statute.

If the limitation period does run on a violation this occurrence should not greatly hinder the overall goal of pollution abatement, *see* Clean Water Act § 301, 33 U.S.C. § 1311 (1982), or the deterrent effect of penalties. *See EPA Penalty Policy, supra* note 136. If the violations continue throughout an initial five-year period, new opportunities for

system reaps the benefits of fairness, stability, and efficiency that limitation periods offer.[158] In the often quoted words of Chief Justice Marshall, "In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture."[159]

CONCLUSION

Citizen suits have become an important adjunct to EPA and state enforcement of the Clean Water Act. Congress, however, did not provide a statute of limitations applicable to citizen suits under the Act, leaving the issue for courts to decide. The normal practice of borrowing a state time bar would result in inconsistent citizen enforcement among the states and would frustrate the policies of uniformity and consistency which underlie the Act. On the other hand, allowing a private cause of action to live indefinitely would result in inconsistent enforcement between EPA and citizen suits and would sacrifice the benefits of fairness, stability, and efficiency that limitation periods offer.

The most appropriate limitation period is the generic federal five-year statute of limitations for penalty actions. Through this statute, Congress expressly limited the time within which the government must collect any federal statutory penalties. This limitation should govern penalty actions brought by the EPA under the Act. Because Congress intended that citizen suits and EPA actions be similarly enforced, the same five year time limitation should govern citizens who sue under the Act.

Carie Goodman McKinney

---

enforcement will constantly arise. If, on the other hand, no violation has occurred for five years, then the pollution will have abated, rendering enforcement action unnecessary. *See* Hudson River Sloop Clearwater, Inc. v. Consolidated Rail Corp., 591 F. Supp. 345, 353 (N.D.N.Y. 1984) ("If compliance, within reason, is the end, the means chosen to achieve that end are less important, particularly where, as here, that end has been realized."), *rev'd on other grounds sub nom.* Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57 (2d Cir. 1985).

158 *See supra* notes 46-52 and accompanying text.

159 Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1805).